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In The

Supreme Court of the United States

October Term, 1983

ANTONIO CORDOVA GONZALEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether a United States District Court, sitting in a State where imprisonment for debt has been abolished, has jurisdiction to order the incarceration of an attorney for failure to pay costs taxed against him pursuant to 28 U.S.C. §1927.

2. Whether economic sanctions against an attorney pursuant to 28 U.S.C. §1927 can be imposed absent a specific prior finding of bad faith by the trial court.

TABLE OF CONTENTS

Contents

TABLE OF CITATIONS

Cases Cited:

Statutes Cited:

Contents

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Antonio Cordova Gonzalez hereby petitions that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on January 30, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at ____ F.2d ____ *sub nom. In re Antonio Cordova Gonzalez* and is printed in the Appendix at page 1a.

The orders of the United States District Court for the District of Puerto Rico are unreported, and are printed in the Appendix at 14a-28a.

JURISDICTION

The First Circuit's judgment was entered on January 30, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 2007 of the United States Code provides:

> "(a) A person shall not be imprisoned for debt on a writ of execution or other process issued from a Court of the United States in any state wherein imprisonment for debt has been abolished. All modifications, conditions, and restrictions upon such imprisonment provided by state law shall apply to any writ of execution or process issue from a Court of the United States in accordance with the procedure applicable in such state."

Section 1927 of the United States Code provides:

> "Any attorney or other person admitted to conduct cases in any Court of the United States or any territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the Court to satisfy personally such excess costs."

STATEMENT OF THE CASE

Antonio Cordova Gonzalez is a distinguished local attorney with an active practice in the Federal Bar since 1962. He was Assistant United States District Attorney for the District of Puerto Rico from 1964 to 1966. Since then he has been in private practice, handling both civil and criminal cases in the Commonwealth, and in the federal courts. His performance both as a federal employee and as a private practitioner has been impeccable.

On May 3, 1982, Mr. Cordova appeared as counsel for a defendant in a criminal case filed by the United States of America against Hector Segarra Irizarry in which a twenty-five count indictment was filed against Segarra-Irizarry for alleged Medicare fraud.

The criminal case filed by the United States was extremely toilsome and involved among other things documentary evidence consisting of thousands of documents which required expert analysis. In view of the complexity of the case and considering that the defendant was both an accountant and an attorney, Mr. Cordova agreed to act on his defense provided that he could count on an active collaboration from Mr. Segarra.

This did not turn out as agreed. The client gave very little cooperation to Mr. Cordova, and also failed to pay his agreed part of the retainer.

The trial had been set for July 28, 1982. In view of the lack of preparation, and non-payment of the attorney's fees, Mr. Cordova filed a motion requesting withdrawal as counsel on July 20, 1982. Although no mention was made on said motion as to the lack of cooperation from his client, this element of his petition for withdrawal was amply expounded by Mr. Cordova, as well

as by his client in the hearing held by the District Court on July 20, 1982 and again on March 4, 1983.

The court accepted Mr. Cordova's withdrawal, and continued the trial. However, it expressed its conviction that the attorney had been negligent in the preparation of his client's defense and instructed the plaintiffs to file a memorandum of costs which would be considered by the court in imposing economic sanctions against Mr. Cordova.

The Government filed a bill of costs for $4,176.70 on August 2, 1982. After considering the memorandum of costs filed by the Government, the court ordered Mr. Antonio Cordova Gonzalez to deposit the sum of $6,500 in the clerk's office.

After denying a motion for reconsideration, the court entered an order to show cause, requesting Mr. Cordova to explain why he had not complied with the order. Mr. Cordova filed a response in which the court was requested to vacate, and to set aside, all of its previous orders in view of the explanation therein given.

The matters were set again for a civil contempt hearing for March 4, 1983 in order to determine whether Mr. Cordova was in contempt of the court for failure to deposit the sum of $6,500 within the term given by the court.

In said hearing, Mr. Cordova testified that the reasons behind his withdrawal as attorney on July 20, was the lack of cooperation from Mr. Segarra, and the failure of the latter to pay the agreed fees. This was indeed corroborated by the testimony of Mr. Segarra Irizarry.

After hearing all the evidence, the court sustained the imposition of sanction and ordered Mr. Cordova to deposit $6,500 for costs, on or before March 21, 1983, under pain of contempt.

Mr. Cordova was warned that if the moneys were not deposited before that date, he would be arrested and incarcerated.

On March 18, Mr. Cordova filed a notice of appeal from the order denying his motion to vacate and set aside the contempt order. A supersedeas bond for $7,500 was posted by Mr. Cordova and a motion for approval of the supersedeas bond.

Upon learning of the appeal, the district judge issued an immediate order for his arrest and incarceration. The court instructed the U.S. Marshal to arrest Mr. Cordova forthwith and rejected any appeal bond because it would only serve to destroy the effectiveness of the contempt proceeding.

At 5:15 p.m. the marshals entered the office of Mr. Cordova, placed him in custody and took off to the Bayamon Regional Jail, where he would remain committed. By chance they stopped in the courthouse building where Mr. Cordova happened to meet a U.S. Magistrate. He explained his predicament to the magistrate who, in view of the fact that Mr. Cordova was to be taken immediately to the Bayamon Regional Jail, allowed him to place $6,500 as security for the appeal. At 7:00 p.m. a close friend, was able to deposit the sum of $6,500 in cash, and Mr. Cordova was released some time later.

REASONS FOR GRANTING THE WRIT

I.

The decision below ignored the requirement set by this Court in *Roadway Express Inc. v. Piper*, 447 U.S. 752, 767 (1980) which demands that sanctions against counsel must be preceded by a specific finding by the trial court of willful misconduct or bad faith. It also failed to recognize the ample precedents in other Circuits demanding such prior specific findings by the trial court as a condition precedent to the imposition of penalties against an attorney.

There is no doubt that a federal court may tax costs and expenses against counsel who has willfully abused judicial processes. *Roadway Express Inc. v. Piper*, 447 U.S. 752, 766-67 (1979). This Court, however, in *Roadway Express Inc.*, conditioned this principle upon a specific prior finding by the trial court that the conduct of counsel constituted or was tantamount to bad faith. According to *Roadway Express Inc., supra* at 767 such ". . . finding . . . would have preceded any sanction under the Court's inherent powers."

This prerequisite is not a mere technicality, but serves to guard the imposition of sanctions against attorneys except in those extraordinary circumstances when it is evident that the attorney has acted willfully, or in bad faith.

This is the standard that has been followed by the Second, Sixth, Seventh, Ninth, and Eleventh Circuits. Since the opinion below ignored all of the conflicting precedents it is necessary to point out that as recent as 1982, the Ninth Circuit held that assessment of attorney's fees and costs against counsel require specific findings of willfull misconduct or bad faith. *Barnd v. City of Tacoma*, 664 F. 2d 1339, 1343 (1982). In *Barnd* the defense

attorney caused a mistrial in a criminal case due to his improper remarks during the opening statement. The Court felt that such imprudent conduct, in the absence of specific findings of fact of willful misconduct or bad faith litigation could not be sustained on appeal.

The requirement of bad faith or willful misconduct has been followed by the Sixth Circuit in *United States v. Ross*, 535 F.2d 346 (6th Cir. 1976); by the Second in *Nemeroff v. Abelson*, 704 F. 2d 652, 656 (1983); and by the Eleventh in *Durrett v. Jenkins Brickyard Inc.*, 678 F. 2d 911, 919 (1982).

The argument propounded by the appearing petitioner was considered by the Seventh Circuit in *McCandless v. Great Atlantic and Pacific Co. Inc.*, 697 F. 2d 198, 200 (1983). The court in *McCandless* was uncertain as to what standard this Court had chosen to apply in *Roadway Express* concerning an award of fees against counsel. *McCandless, supra* at 201. The Circuit, however, did not enter into that problem because the District Court had expressly found the attorney "guilty of bad faith", *McCandless, supra* at 201.

In short, *Roadway Express Inc. v. Piper*, 447 U.S. 752 (1980) and its progeny demand an intentional abuse standard which focus on the attorney's bad faith, and not on his inadvertence, or possible negligence, during the course of a litigation. *Awards of Attorney's Fees Against Attorneys: Roadway Express Inc. v. Piper*, 60 Boston Univ. L. Rev. 950, 966 (1980).

There is nothing in the opinion of the District Court that even suggests bad faith or willful misconduct on the part of petitioner. Even the District Court's worst finding against him was that he was negligent in the defense of his client for having relied on his assistance for the preparation of the case. This finding, even if accepted as correct, does not meet the legal threshold

required by this Court in *Roadway Express Inc. v. Piper,* 447 U.S. 752 (1980) in order to impose economic sanctions directly against the attorney.

II.

The decision below if allowed to stand would permit a United States District Court in Puerto Rico to order the imprisonment for non-payment of costs. This rule of law would be contrary to Section 2007 of the United States Code and the public policy embodied in the Constitution of the Commonwealth of Puerto Rico.

Petitioner brought before the Court of Appeals the fact that the District Court had no jurisdiction to use its contempt power to compel the payment of costs and to force the petitioner to pay, under the duress of incarceration, the costs incurred by the prosecution during the criminal proceeding in which he was the defense counsel.

As it was pointed out to the Court of Appeals, Section 2007 of Title 28 of the U.S. Code prohibits the imprisonment of any person for debt on a writ of execution issued from a court of the United States in any State wherein imprisonment for debt has been abolished. Thus, a United States District Court can order the imprisonment in lieu of ordinary execution, only if that method is allowed in the State where the court is sitting.

In Puerto Rico both the Organic Act of 1917, and the Constitition of the Commonwealth of Puerto Rico specifically forbid the imprisonment for debt.[1]

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1. "That no person shall be imprisoned for debt." Organic Act of 1917, Section 2, Bill of Rights.

"No person shall be imprisoned for debt." Article II, Section II, Constitution of the Commonwealth of Puerto Rico.

The definition of debt means in Puerto Rico any and all kinds of moneys owed, except criminal fines and support orders. Pursuant to that constitutional protection the Puerto Rico Supreme Court has held that contempt power cannot be used even to compel the payment of tax owed to the government since it may hold the debtor in jeopardy of imprisonment, something which would be forbidden by the Bill of Rights of Puerto Rico. *Municipality of Aguadilla v. American Railroad Co.*, 30 Puerto Rico Reports 526 (1922).

III.

The issue raised in this petition is not moot.

The contempt entered against petitioner, by itself, calls for review by this Court. Should it remain undisturbed, it could possibly serve as basis for disciplinary proceedings in the future against him. This fact alone makes the controversy one capable of adjudication by this Court.

It seems somewhat perverse to hold, as the Court of Appeals did, that the moneys deposited by petitioner in court while in route to the penitentiary was equivalent to a compliance with a contempt order so as to make it moot.

The position of the Court of Appeals, if upheld, would make unreviewable any civil contempt order unless the defendant would be willing to suffer months of incarceration until the end of the appeal process.[2]

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2. As it appears from the contempt judgment of the District Court, and from the opinion of the Court of Appeals, the District Court refused any supersedeas bond because to do so "would serve to destroy the effectiveness of the contempt proceedings."

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1214
83-1326

IN RE ANTONIO CORDOVA GONZALEZ,

Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Carmen C. Cerezo, *U.S. District Judge]*

Before

Coffin, *Circuit Judge,*

Swygert,* *Senior Circuit Judge,*

and Bownes, *Circuit Judge.*

David Rive Rivera, with whom *Alvaro R. Calderon, Jr.,* and *Calderon, Rosa-Silva & Vargas* were on brief, for appellant.

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* Of the Seventh Circuit, sitting by designation.

Opinion

Joyce Kallam McKee, Trial Attorney, with whom *Robert W. Ogren,* Chief, Fraud Section, Criminal Division, Department of Justice, were on brief, for appellee.

January 30, 1984

BOWNES, *Circuit Judge.* Antonio Cordova Gonzalez appeals an order of the district court assessing him $6,500 as a sanction because he withdrew as counsel for the defendant in a criminal case eight days prior to the date set for the start of the trial. His withdrawal necessitated a trial continuance of four months. The $6,500 represented costs incurred by the prosecution preparing for trial, an estimate of its costs for getting ready for the second trial and attorney's fees.

I.

A detailed statement of facts is necessary. On April 30, 1982, a twenty-five count indictment alleging Medicare fraud was returned against Hector Segarra Irizarry. On May 3 Cordova filed an appearance on behalf of Segarra. A status conference on the case attended by Cordova and the prosecutor was held by the district court on May 20. After the conference, the court entered an order setting June 9, 11, and 14 as the dates for discovery of the government's evidence by the defendant. These dates were chosen to accommodate Cordova. The order also set June 14 as the date for the next status conference and noted that July 9 was the Speedy Trial Act deadline.

On June 14 Cordova moved for a continuance of the status conference scheduled for that same day. The motion was granted and the conference was rescheduled for June 16. Cordova was informed by the court that no further continuances would be

granted. At the conference on June 16 Cordova informed the court that the government had supplied him with all the documents it intended to use in its case-in-chief, about two hundred pages, but that he had not yet had a chance to inspect them. He said that on June 18 he would file for an extension of time in which to prepare pretrial motions. Cordova was told by the court that if the motion for extension was not filed promptly or was not justified, the case would be set down for a final pretrial conference and trial.

On June 18 Cordova moved for an extension of the trial and offered to waive the speedy trial rights of his client. The reasons given for the requested extension were: the voluminous documentary material that had to be examined; that Cordova planned to take depositions in a civil case from June 21-25; and that he had planned a two-week vacation after the depositions.

On June 21 the court gave Cordova until July 9 to complete the document inspection and file pretrial motions. The court advised Cordova that taking civil depositions and a vacation "are not reasons for extending the speedy trial limits and should not be presented to the court as such." Cordova was also told that no further extension would be granted for filing pretrial motions and that the court would review the file on July 9 for pretrial motions and that, if defendant's pretrial motions were not before the court, the case would be set for a final pretrial conference and trial within two weeks. No pretrial motions were filed on behalf of the defendant by July 9. On July 12, the court scheduled a final pretrial conference for July 23 and trial for July 28.

On July 20 Cordova requested permission to withdraw as counsel for the defendant. The only reason given was that the defendant had not paid the attorney fees requested. Cordova was

notified by mail and telephone that there would be a hearing on his motion on July 23. Cordova was thirty minutes late for the hearing.

The first witness at the hearing was the defendant, Segarra Irizarry. Segarra is a member of the bar of Puerto Rico, but does not practice law. He testified as follows. He first learned of Cordova's intention to withdraw as his counsel only a few days prior to the hearing. No written fee agreement was entered into between Cordova and himself. In May he received a request for a retainer of $10,000.00. He did not contest the total amount of the charges, but was not able to pay at this time.

In his testimony, Cordova emphasized something that had not been brought to the attention of the court prior to this time, the failure of the defendant to help him prepare the case for trial. According to Cordova, Segarra had agreed to go through the documents furnished by the government "and make reports to me [Cordova] in connection with the pertinency in the defense of the case." Cordova also testified about difficulties he had with defendant's cousin, Attorney Luis Guillermo Zambrana, who Cordova asserted was co-counsel in the case. Cordova ended his testimony by stating, "defendant for whatever reason he has had, has not put me in a position to defend him properly."

Neither the defendant nor Cordova specified the total fee that was to be charged.

On July 28 the court issued a detailed order recounting the procedural history of the case prior to the date on which the motion for withdrawal was filed. The court pointed out that the defendant's cousin, Attorney Zambrana, did not appear on the

record as counsel for the defendant and that "the only attorney who has appeared in court since the arraignment and bail reduction hearing has been Mr. Cordova Gonzalez." The court specifically found:

> Defense counsel justifies his failure in filing the pretrial motions he had announced and his lack of preparation for trial on the fact that defendant did not prepare the relation and study of documents that he had requested from him. It is no secret that any defendant confronted with criminal charges is under stress and hardship. Mr. Cordova Gonzalez' dependence on defendant is unjustified and unnecessarily places the burden on his client beyond permissible limits. His representations to the Court, if accepted as valid, would force us to allow a situation in which an attorney abandons his duty to prepare adequately in protection of his client's interests. It is beyond question that the primary responsibility for the preparation of this case rested on defense counsel and not on defendant. He accepted that obligation when he agreed to defend him. This is not a situation in which a defendant merely refuses to assist his attorney in preparing his defense but rather one in which the attorney has passed on to his client the study of the documentary evidence before he took it upon himself to discharge his duty towards defendant. One cannot help wondering if defense counsel views his role in this case as one of a stand-by counsel for a *pro se* defendant rather than what it should be—that of

> a concerned attorney solely in charge of a complex case entrusted to him by a defendant who faces maximum penalties of 125 years imprisonment. Attorney Cordova Gonzalez was granted ample and sufficient time, at his own request, to prepare pretrial motions and failed to do so. His excuses for not complying with the deadline set by the Court are not acceptable. Defense counsel was given complete discovery by the government and all documentary evidence to be used at trial was made available to him.

The court further faulted Cordova for not entering into a fee agreement with his client at the outset of their relationship.

The court concluded:

> After reviewing the entire file of this case and considering the testimony of defendant and the statements of his counsel during today's hearing, the Court is convinced that the attorney has been negligent in his preparation of defendant's defense and that he has unduly exposed his client and placed his interest in a speedy trial in jeopardy. He has also jeopardized and undermined defendant's right to the effective assistance of counsel. Solely for this reason and no other the Court firmly believes that defendant could not stand trial on July 28, 1982 since his attorney has not adequately prepared his defense. Thus, to prevent a miscarriage of justice since defendant would be deprived of the effective assistance of

> counsel if he were to be tried on July 28, 1982, this Court understands that the interest of justice outweighs those of defendant and the public in a speedy trial and, therefore, is forced to continue said trial to a later date which will be fixed in a separate order.
>
> . . . The Court further understands that the attorney's conduct demands that he be sanctioned by this Court and, therefore, instructs plaintiff to file within the next five (5) days after notice of this Order a memorandum of costs which will be considered by the Court in imposing economic sanctions on this attorney.

In response to the court's order, the government filed a memorandum of costs totalling $4,176.70. It also added the following statement:

> The government has not included in its above statement of costs other expenses which resulted from defense counsel's motion to withdraw. However, it should be noted that the government's attorneys spent three hours in preparing a response to the motion to withdraw and nearly two hours in court for the hearing (including 30 minutes waiting for Mr. Cordova-Gonzalez). In addition, the postponement of the trial will cause the government to incur other expenses in the future. Including in these expenses will be the cost of resubpoenaing the government's witnesses and providing an attorney or agent for the second

> discovery period necessary for defendant's new counsel. The government requests that the Court consider these as yet unincurred expenses in imposing a sanction on Mr. Cordova-Gonzalez.

On August 13, 1982, the court ordered Cordova "to deposit the sum of $6,500.00 in the Clerk's office within ten days after the notice of this Order in payment of the expenses incurred by plaintiff including attorney's fees." No payment was made. Instead, on August 25 a motion for reconsideration was filed. This motion was denied on the same day it was filed.

On October 8, no payment having been received, Cordova was ordered to show cause within fifteen days why he should not be found in contempt. Cordova asked for and was granted an additional twenty days to respond to the show cause order. His response was filed on November 10. On February 15 the court scheduled a civil contempt hearing for March 4, 1983, to determine whether Cordova should be held in contempt of court.

At the contempt hearing Cordova testified that he had to withdraw as defense counsel because the defendant had not prepared the documents as promised. He stated that he would not have withdrawn for nonpayment of fees and that he gave that as the reason in the motion because "I did not want to jeopardize the defendant, making him look irresponsible." Cordova asserted that the real reason for his motion to withdraw as counsel was that he was not prepared properly to defend the case. He testified that his total fee would have been $30,000 and that all he received was $2,000.

The defendant Segarra testified that the total fee was to be $35,000, that Cordova had asked for a $10,000 retainer and that

he had paid him $2,000. Segarra stated that Cordova gave him two reasons for withdrawing, the failure to pay the retainer and that he was not ready for trial. Segarra also testified that he reported to Cordova once a week or every two weeks on the progress he was making with the documents and that he had not finished going over the documents when the motion to withdraw was filed.

Cordova's accountant testified that Cordova was in a very bad financial condition. On cross-examination, however, he admitted that Cordova owned property in Bayamon, Puerto Rico, with a market value of $1,000,000 and a mortgage against it of $600,000.

At the conclusion of the hearing, the court found Cordova in contempt of court, gave him until March 21, 1983, to pay the $6,500 into court, and warned him that if payment was not made by 5:00 P.M. on that date the court would order his immediate commitment.

Cordova filed a notice of appeal on March 18 and asked that the court determine the amount of security to be posted by bond pending appeal. On March 21 the court issued a written order summarizing what had happened to date and committing Cordova to the custody of the United States Marshal "until such time as he purges himself of contempt by complying with the Court's order of August 16, 1982. . . ." The court issued a separate order the same day, March 21, addressing Cordova's request for a supersedeas bond pending appeal. It pointed out that the first supersedeas bond was posted by a surety that was unacceptable because it was on a list of sureties owing bonds that had been forfeited by the Commonwealth of Puerto Rico. The court then stated:

Opinion

> As to the substitute bond subsequently filed on March 21, 1983, the Court rules that a stay by the filing of the supersedeas bond under the circumstances of this case as set forth in the contempt judgment would serve to destroy the effectiveness of the contempt proceeding. Furthermore this respondent falsely and deliberately induced the Court to believe that he was accepting its ruling and would comply with its order by depositing the sanction imposed within the extension of time requested. By such conduct he has obstructed the administration of justice by willfully and unjustifiedly delaying the entry of a contempt judgment against him.

The motion for approval of a supersedeas bond was denied.

The next series of events is not part of the record, but there is no serious dispute about them. Cordova was picked up by a United States Marshal in the late afternoon of March 21. He was informed that he was going to be confined in the Commonwealth prison. He was given an opportunity to call a friend and at 7:14 P.M. $6,500 was paid to the clerk of court. Cordova filed a notice of appeal on April 19.

We conclude our recitation of the facts by noting that new counsel appeared for Segarra on September 2, 1983, the case was tried in November, and Segarra was acquitted on all counts.

II.

It has long been recognized that federal courts have inherent powers, those which "are necessary to the exercise of all others." *United States v. Hudson*, 7 Cranch 32, 34 (1812).

> The power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes. See Renfrew, Discovery Sanctions: A Judicial Perspective, 67 Calif. L. Rev. 264, 268 (1979). Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record. But in a proper case, such sanctions are within a court's powers.

Roadway Express, Inc. v. Piper, 447 U.S. 752 at 766-67 (1979) (footnotes omitted). *See also Ramos Colon v. United States Attorney for D. Puerto Rico*, 576 F.2d 1, 3 (1st Cir. 1978).

There are three questions: did Cordova's conduct merit sanctions; if so, was he given fair notice and a hearing on the record; and was the sanction imposed excessive.

The facts support without question the district court's finding that Cordova was negligent and acted in disregard of his duty to the court and his client. Prior to filing his motion to withdraw, Cordova had never intimated to the court or government counsel that he was having difficulty preparing the case or that his fee had not been paid. The withdrawal motion, filed three days before the final pretrial conference and eight days before the scheduled trial date, was nothing short of an obstruction to the administration of justice. Neither of the two reasons advanced for withdrawal, failure of the client to pay legal fees and failure of the client to prepare discovery documents for trial, justified a withdrawal at this stage of the proceeding. While the facts speak for themselves,

it must be noted that Cordova's requests for continuances and extensions of filing dates prior to July 20 had been granted. The court had gone as far as it could go, especially in light of the strictures of the Speedy Trial Act, in giving Cordova additional time for trial preparation. In this connection, we also note that Segarra's new counsel were able to mount a successful defense with two months of preparation.

Cordova's right to notice and a hearing before the imposition of sanctions was fully protected, and he does not claim otherwise.

We do not think the amount of the penalty was excessive. The sanction was based on the costs actually incurred by the government in preparing for the aborted trial, a well-founded estimate of the cost of preparing for the second trial and attorney's fees. We agree with appellant that intentional bad faith in the conduct of litigation is an impelling factor in determining whether an attorney should satisfy costs personally. We can think of no clearer example of bad faith in the conduct of litigation than to file a motion for withdrawal eight days before the start of a lengthy and complicated criminal trial on the sole ground that legal fees had not been paid and then at the hearing on the motion advance an entirely different reason for withdrawing as counsel—that the client had not properly prepared the case for trial.

III.

The question whether the court properly used its civil contempt power is moot because Cordova purged himself of contempt by paying the fine. Once a civil contempt order is complied with, no case or controversy remains. *See In Re Campbell*, 628 F.2d 1260, 1261 (9th Cir. 1980) (comprehensive listing of cases).

Opinion

The only way that Cordova could have challenged the incarceration order was by refusing to pay the fine and going to jail. His decision not to do so ended the civil contempt aspect of the case.[1]

Affirmed. Double costs are awarded to the government.

1. If it is any consolation to Cordova, we note our disagreement with his contention that the court had no right to order incarceration because imprisonment for debt is forbidden by 28 U.S.C. §2007(a). We can think of no grounds for a successful challenge to the imprisonment order.

CONTEMPT JUDGMENT AND COMMITMENT ORDER DATED MARCH 21, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MISC. 82-0073CC

IN RE:

ANTONIO CORDOVA GONZALEZ, ESQ.

On March 4, 1983 a civil contempt hearing was held after affording respondent Antonio Cordova Gonzalez, Esq. sufficient notice.[1] At said hearing the testimony of Mr. Cordova Gonzalez was received, as well as that of three other witnesses presented by him. After considering the testimonial evidence and having reviewed criminal case 82-0082, the Court denied respondent's request to vacate its previous orders of July 28, August 16 and October 8, 1982.[2]

The evidence presented during the contempt hearing was essentially a repetition of that offered during the hearing on his

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1. On February 15, 1983 an order was filed and notified on that same date requiring Mr. Cordova Gonzalez to appear on March 4, 1983 for a civil contempt hearing to determine whether he was in contempt of Court for failing to comply with an order filed on August 16, 1982 in criminal case 82-0082, *United States v. Hector Segarra Irizarry*, requiring him to deposit the sum of $6,500 in the Clerk's Office within ten days after notice in payment of the expenses incurred by the United States in preparation for trial in said criminal case. The August 16, 1982 order was entered as a result of the findings set forth in an order filed on July 28, 1982 in criminal case 82-0082.

2. Said request had been made in the response to an order to show cause filed by respondent November 12, 1982.

motion to withdraw as counsel for defendant in criminal case 82-0082, filed on July 20, 1982. Rather than persuading the Court that the findings set forth in the July 28, 1982 order were erroneous, the evidence presented in support of respondent's defenses to a contempt determination clearly demonstrates that Mr. Cordova Gonzalez incurred in reckless disregard of his responsibilities as an attorney, that he violated his client's right to an effective assistance of counsel by unduly placing upon the defendant the burden of preparing his defense and by seeking a continuance a few days before trial, knowing that this would result in delaying the trial date, for the sole reason that his fees had not been payed. As a result of this untimely motion to withdraw as attorney and his abandoning his client's defense, the trial had to be continued to prote ' defendant's interests, despite the fact that the government had i urred in substantial expenses in preparation for trial.

Mr. Cordova Gonzalez for months ignored the Court's order of August 16, 1982 requiring him to reimburse to the government expenses in the sum of $6,500 within ten days after notice of said order. It was not until the Court issued an order to show cause on October 12, 1982 that respondent attempted to state his reasons for failing to comply with that order. In his response of November 12, 1982 Mr. Cordova Gonzalez once again challenged the July 28, 1982 order although the previous motion for reconsideration filed by him on August 25, 1982.

After the Court denied Mr. Cordova Gonzalez' request to vacate the July 28 and August 16, 1982 orders at the conclusion of the contempt proceeding, he then moved for a reduction of the sum of $6,500 which was also denied. Upon the Court's inquiry as to respondent's willingness to comply with its order of sanctions, respondent proceeded to request an extension of time to deposit

in Court the economic sanction imposed upon him. Upon granting him until March 7, 1983 to comply, he requested a bench conference and then expressed that since he would be receiving monies forthcoming from a settlement agreement in a case in which a stipulation had been approved by Hon. Raymond L. Acosta, he would deposit the sum owed if the Court allowed him a lengthier extension of fifteen working days. The Court then granted him until Monday, March 21, 1983 before 5:00 PM to comply with its order by depositing in the Clerk's Office the sum of $6,500 imposed as sanction in criminal case 82-0082. He was expressly advised in open court that, if on that date and before 5:00 PM he did not comply, the Court would enter an order of contempt and order his commitment immediately.

Despite the fact that the extension requested by Mr. Cordova Gonzalez to comply has expired, and despite the fact that he expressed willingness to comply within such term after the Court ruled that no just cause had been shown for his disobedience of the July 28 and August 16, 1982 orders, respondent has failed to deposit said sum even though the Court's requirements to that effect were clear and definite. Prior to the expiration of the extension granted, it was evident to the Court that respondent was unwilling to comply since on March 18, 1982 he filed a Notice of Appeal and a Motion for Approval of Supersedeas Bond.

WHEREFORE, the Court hereby ADJUDGES that respondent Antonio Cordova Gonzalez is found to be in civil contempt of this Court for his failure to obey the order filed on August 16, 1982 requiring him to deposit in the Clerk's Office the sum of $6,500 within ten days after notice of that order, to reimburse the government for expenses incurred in preparation for trial in criminal case 82-0082, which order was entered as a

result of the findings set forth in a prior order filed on July 28, 1982. It is therefore

ORDERED that Antonio Cordova Gonzalez, Esq. is hereby committed to the custody of the U.S. Marshal for the District of Puerto Rico until such time as he purges himself of his contempt by complying with the Court's order of August 16, 1982 and it is further

ORDERED that upon his compliance he will be released from confinement.

SO ORDERED AND ADJUDGED.

At San Juan, Puerto Rico, on March 21, 1983.

s/ Carmen Consuelo Cerezo
CARMEN CONSUELO CEREZO
United States District Judge

ORDER DENYING MOTION FOR APPROVAL OF SUPERSEDEAS BOND DATED MARCH 21, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MISC. 82-0073CC

IN RE:

ANTONIO CORDOVA GONZALEZ, ESQ.

On March 18, 1983 respondent Antonio Cordova Gonzalez filed a Notice of Appeal and a Motion for Approval of Supersedeas Bond. In said Notice of Appeal respondent states that he is appealing "from the order entered on March 4, 1983 denying the motion to vacate judgment." On March 4, 1983 what was denied in open Court was his request to vacate our previous orders of July 28, August 16 and October 8, 1982 as indicated in his response to the order to show cause filed by him on November 12, 1982. No judgment was entered on March 4, 1983 since the Court made no contempt determination at the time due to respondent's request, which was granted, that he be allowed an extension of fifteen days to comply with the August 16, 1982 order imposing sanctions in the sum of $6,500. Thus, no contempt judgment could be entered unless and until respondent failed to comply with the Court's March 21, 1983 deadline which was set for compliance upon his request. Accordingly, no appeal can be taken from a judgment for none had been entered on March 18, 1983. What respondent is in effect referring to is to an appeal from an interlocutory order issued in open Court denying his motion to vacate our prior ruling imposing sanctions. It is noted that the order appealed from does not meet the requirements and characteristics of an appealable interlocutory order under 28 USC 1292(b).

Even considering it as an ordinary appeal, which it is not, the supersedeas bond was posted by a surety who is unacceptable since this person is included in a list of sureties who owe bonds that have been forfeited by the Commonwealth of Puerto Rico. This information is obtained from a letter dated March 7, 1983 from Assistant District Attorney Pedro J. Claverol Siaca to the Clerk of this Court.

As to the substitute bond subsequently filed on March 21, 1983, the Court rules that a stay by the filing of the supersedeas bond under the circumstances of this case as set forth in the contempt judgment would serve to destroy the effectiveness of the contempt proceeding. Furthermore, this respondent falsely and deliberately induced the Court to believe that he was accepting its ruling and would comply with its order by depositing the sanction imposed within the extension of time requested. By such conduct he has obstructed the administration of justice by willfully and unjustifiedly delaying the entry of a contempt judgment against him.

WHEREFORE, the Motion for Approval of Supersedeas Bond is DENIED.

SO ORDERED.

At San Juan, Puerto Rico, on March 21, 1983.

s/ Carmen Consuelo Cerezo
CARMEN CONSUELO CEREZO
United States District Judge

ORDER DATED JULY 28, 1982 FOR PLAINTIFF TO FILE MEMORANDUM OF COSTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CRIMINAL 82-0082

UNITED STATES OF AMERICA

Plaintiff

vs.

HECTOR SEGARRA IRIZARRY

Defendant

This case involves a twenty-five count indictment filed against attorney Hector Segarra Irizarry. The first count charges that from January 1, 1975 until on or about December 31, 1979 the defendant allegedly conspired with unindicted persons to defraud the United States and its agency, the Department of Health and Human Services, of its rights to have the Medicare Program conducted honestly and free from deceit and corruption, including its right to have said agency make Medicare reimbursement payments through Blue Cross of Florida, Inc. to the Program based upon complete and honest disclosure of all material information and that he failed to disclose material information in a matter within the jurisdiction of the agency by making and using false writings and documents knowing the same to contain fraudulent material statements and entries in violation of Title 18 United States Code Section 1001. Counts two through twenty-five charge that from October 20, 1977 to October 31, 1978 the defendant, in a matter within the jurisdiction of the Department of Health and Human Services, did knowingly and willfully make and use false writings

and documents, that he prepared and submitted false Program Cost Reports to Blue Cross for Program subunits specified in each count in which it was certified that the net reimbursable costs contained therein were true and correct when he knew said certifications were false in that the net reimbursable costs were overstated by the amount of rental equipment charges of Medi-Hosp and HESI Medical Supplies, Inc. which were in excess of the actual cost of Medi-Hosp and HESI Medical Supplies, Inc. in furnishing said equipment to the Program, in violation of Title 18 United States Code Sections 1001 and 2. In his initial appearance before the U.S. Magistrate on April 30, 1982 defendant was represented by attorney Luis G. Zambrana who informed that Blas C. Herrero, Esq. would represent defendant for all trial purposes. This attorney was advised by the Magistrate that until attorney Herrero filed his appearance he would have to remain in the case. On May 3, 1982 Antonio Cordova Gonzalez, Esq. entered his appearance as counsel for defendant and on that same date he filed a motion for reduction of bond on behalf of defendant which was set for hearing and granted. Since that date defendant has appeared represented solely by attorney Cordova Gonzalez. At no time has any representation been made to the Court that Cordova Gonzalez was co-counsel for defendant together with attorney Zambrana and the only attorney who has appeared in Court since the arraignment and the bail reduction hearing has been Mr. Cordova Gonzalez. A status conference was held on May 20, 1982 at which Cordova Gonzalez appeared on behalf of defendant and John C. Carver, Esq. for the government. A timetable was set for the inspection of documents by defendant and his attorney at the Department of Health and Human Services. A further status conference was then scheduled for June 14, 1982 and defendant and his attorney were advised that all pretrial motions which did not require, prior to their filing, the inspection of documents were to be presented to the Court before that second

status conference. The parties were also reminded on May 20, 1982 that the speedy trial limit was July 9, 1982. This status conference was re-scheduled at defendant's request for June 21, 1982 and later advanced for June 16, 1982. At the second conference defendant's attorney informed that he had been supplied with all documents that the government intended to use at trial but that he had been unable to inspect them all. He also informed that he would file a motion requesting a final extension to present all pretrial motions no later than June 18, 1982 before noon time and was advised that if this was not done the Court would set the case for pretrial and trial immediately. Defendant filed the motion requesting extension of the trial setting and a waiver of the right to a speedy trial and there informed that his attorney would be absent from the jurisdiction on June 21, to June 25, 1982 taking depositions in a civil case and would thereafter take a two-week vacation with his family. On June 22, 1982 the Court entered an Order stating: "The reasons given by defense counsel in its motion filed June 18, 1982 concerning depositions to be taken in a civil case and a two-week vacation thereafter are not reasons for extending the speedy trial limit and should not be presented to the Court as such. The sole basis for the Court's ruling extending the time for filing pretrial motions is based on the complexity and volume of the documentary evidence disclosed by the government." It was provided in that Order that on July 9, 1982 the Court would again review the file on this case for the disposition of pretrial motions and defendant was expressly advised that if at such date his pretrial motions were not filed the case would be set for a pretrial conference and trial within the following two weeks. Since defendant did not file any motions before the July 9, 1982 deadline, the case was set for a pretrial conference on July 23, 1982 at 9:00 AM and for trial on July 28, 1982 at 8:30 AM. A separate order setting the

pretrial conference and giving specific directives to the parties as to the matters to be discussed was issued on that same date. The order setting the case for a pretrial conference and for trial was notified to the attorneys and to defendant on July 13, 1982. On July 20, 1982 attorney Cordova Gonzalez filed a Motion Requesting Withdrawal as Counsel in which the only reason given was "that defendant has been impossible (sic) to pay for the fees requested as attorneys fees for his defense in the above captioned case." Two days later the government filed a response to defense counsel's motion stating that this attorney first entered his appearance as counsel for defendant on or about May 4, 1982, that he had represented defendant through a prolonged period of discovery and two status conferences before the Court, that although he had been ordered to file all pretrial motions by July 9, 1982 none was submitted as promised and that upon receiving notice of the setting of the case for trial on July 28, 1982 the government had made intensive preparations for the trial date, including subpoenaing and scheduling of approximately twenty government witnesses many of whom are residents of the city of Ponce and some of whom would travel to New York City. The government also pointed out that defense counsel had only filed one motion, excluding those for continuances and the motion to withdraw, which was a single pro-forma motion for discovery and that he had totally neglected his client's case and impaired defendant's ability to receive effective assistance of counsel as guaranteed by the Sixth Amendment should trial be held as scheduled. It requested that defendant be ordered to attend the pretrial conference to determine whether his Sixth Amendment rights were being safeguarded and that sanctions be imposed on attorney Cordova Gonzalez for his disregard of the Court's Orders and for his disregard of the right of defendant and the public to a speedy trial of this case. The motion of defense counsel for

leave to withdraw and the government's response were set for hearing on July 23, 1982, the date of the pretrial conference, and defendant was ordered to be present. At the Court's request, he testified at this hearing concerning his contractual relationship with attorney Cordova Gonzalez. He stated that he did not sign a written contract for professional services with Mr. Cordova Gonzalez nor was he told to do so by his attorney. He further testified that actually there never was an agreement on a fixed amount for attorney's fees but that Cordova Gonzalez had informed him about a month ago what he thought was a reasonable amount. According to defendant, he neither accepted nor rejected the fee requested. During the month of May 1982 defense counsel allegedly received from him a retainer fee of $10,000. In his oral argument before the Court, Mr. Cordova Gonzalez stated that neither the retainer fee nor the attorney's fees requested by him had been paid. Defendant also said that attorney Cordova Gonzalez had discussed the case with him but not fully and that he did not recall discussing with his attorney on the matter of preparing pretrial motions, except for a Rule 16 motion.

In discussing his motion for leave to withdraw as defense counsel, Mr. Cordova Gonzalez repeatedly referred to attorney Luis G. Zambrana as co-counsel in this case. There is nothing in the file of the present case which would indicate to the Court that such is the situation. On the contrary, attorney Zambrana specifically stated that his appearance was limited to the initial appearance of defendant before the Magistrate and he was expressly advised that he would remain in the case until the new attorney entered an appearance. This was done by Mr. Cordova Gonzalez since May 3, 1982. It is also obvious from Mr. Cordova Gonzalez' argument before the Court that he relied heavily and unjustifiedly on defendant's own assistance in the preparation

of this case. He urged that because of defendant's multiple problems concerning a divorce action and criminal charges filed by his wife as well as the execution of his properties defendant had been unable to prepare a complete run-down and study of the documents inspected by Mr. Cordova Gonzalez of which copies had been given to defendant. Defense counsel justifies his failure in filing the pretrial motions he had announced and his lack of preparation for trial on the fact that defendant did not prepare the relation and study of documents that he had requested from him. It is no secret that any defendant confronted with criminal charges is under stress and hardship. Mr. Cordova Gonzalez' dependence on defendant is unjustified and unnecessarily places the burden on his client beyond permissible limits. His representations to the Court, if accepted as valid, would force us to allow a situation in which an attorney abandons his duty to prepare adequately in protection of his client's interests. It is beyond question that the primary responsibility for the preparation of this case rested on defense counsel and not on defendant. He accepted that obligation when he agreed to defend him. This is not a situation in which a defendant merely refuses to assist his attorney in preparing his defense but rather one in which the attorney has passed on to his client the study of the documentary evidence before he took it upon himself to discharge his duty towards defendant. One cannot help wondering if defense counsel views his role in this case as one of a stand-by counsel for a *pro-se* defendant rather than what it should be—that of a concerned attorney solely in charge of a complex case entrusted to him by a defendant who faces maximum penalties of 125 years imprisonment. Attorney Cordova Gonzalez was granted ample and sufficient time, at his own request, to prepare pretrial motions and failed to do so. His excuses for not complying with the deadline set by the Court are not acceptable. Defense counsel

was given complete discovery by the government and all documentary evidence to be used at trial was made available to him.

Furthermore, Mr. Cordova Gonzalez' statements in open Court served only to corroborate defendant's own testimony that there was no agreement on fixed attorney's fees. The reason given by defense counsel for requesting withdrawal from the case seems to suggest that defendant could not meet the price later requested by him for services and which were neither accepted nor rejected by his client. In *Colon v. All American Life and Casualty Company,* 81 JTS 87 (1981) the Supreme Court of Puerto Rico stated that any attorney at the outset of his professional endeavor must keep in mind the admonition of Canon 24 of Professional Ethics in the sense that it is desirable that an agreement be reached on the fees to be charged by an attorney at the commencement of the professional relationship, that such an agreement be set in writing and that in those cases in which the extent and value of the services cannot be completely anticipated at the beginning of the professional endeavor, he shall set forth in writing the agreement on professional fees, free of ambiguities and with utmost clarity as to its terms, indicating the foreseeable contingencies that could arise during the course of the lawsuit. Mr. Cordova Gonzalez' motion to withdraw as defense counsel hardly a week before the trial date, a motion which was filed after the order setting the case for trial, if allowed, would necessarily result in the continuance of the trial. Were a court to allow an attorney to withdraw whenever a client defaults in his payment of attorney's fees or is unable to pay the fee requested by his attorney, it would become a participant in the obstruction of justice. Much more so when we are dealing with the administration of criminal justice which requires the holding of

a speedy and a fair trial in the interest of both defendant and the public.

After reviewing the entire file of this case and considering the testimony of defendant and the statements of his counsel during today's hearing, the Court is convinced that the attorney has been negligent in his preparation of defendant's defense and that he has unduly exposed his client and placed his interest in a speedy trial in jeopardy. He has also jeopardized and undermined defendant's right to the effective assistance of counsel. Solely for this reason and no other the Court firmly believes that defendant could not stand trial on July 28, 1982 since his attorney has not adequately prepared his defense. Thus, to prevent a miscarriage of justice since defendant would be deprived of the effective assistance of counsel if he were to be tried on July 28, 1982, this Court understands that the interest of justice outweighs those of defendant and the public in a speedy trial and, therefore, is forced to continue said trial to a later date which will be fixed in a separate order.

The Court understands that not only must Mr. Cordova Gonzalez be allowed to withdraw as counsel but that, in effect, he could not properly serve defendant's interests as trial attorney in this case. The Court further understands that the attorney's conduct demands that he be sanctioned by this Court and, therefore, instructs plaintiff to file within the next five (5) days after notice of this Order a memorandum of costs which will be considered by the Court in imposing economic sanctions on this attorney.

SO ORDERED.

Order

At San Juan, Puerto Rico, on July 28, 1982.

s/ CARMEN CONSUELO CEREZO
United States District Judge